**Paramount Liquor Company *and* Miscellaneous Drivers, Helpers, Health Care and Public Employees Local Union No. 610, affiliated with International Brotherhood of Teamsters, AFL–CIO**

**Allstate Distributors, Inc. *and* Miscellaneous Drivers, Helpers, Health Care and Public Employees Local Union No. 610, affiliated with International Brotherhood of Teamsters, AFL–CIO.** Cases 14–CA–20173, 14–CA–20304, and 14–CA–20332

May 22, 1992

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On July 16, 1991, Administrative Law Judge Frank H. Itkin issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondents filed cross-exceptions and a brief in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, Paramount Liquor Company, St. Louis, Missouri, and Allstate Distributors, Inc., St. Louis, Missouri, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The judge concluded, inter alia, that the Respondents, under the circumstances on September 11, 1989, did not violate Sec. 8(a)(5) and (1) of the Act by implementing their August 29 proposals (other than the proposal to eliminate the spotter/loader position). In agreeing with this conclusion, Chairman Stephens and Member Devaney adopt the judge's finding that the Union's refusal to meet with the Respondents prior to September 11 constituted a waiver of its right to bargain over the changes in mandatory subjects proposed by the Respondents. See, e.g., *Gibbs & Cox, Inc*., 292 NLRB 757 (1989). Accordingly, they find it unnecessary to rely on the judge's finding that the Union's conduct may have constituted consent to the proposals or his implication that the parties had bargained to impasse over them. Member Oviatt adopts the judge's finding that the Union's conduct was evidence of impasse and that, under the circumstances, the Respondents were entitled to implement their August 29 proposals. Thus, unlike his colleagues, he finds it unnecessary to rely on the judge's finding that the Union waived its right to bargain.

*Steven D. Smith, Esq*., for the General Counsel.

*Stanley E. Craven, Esq*., for Respondent Employers.
*George O. Suggs, Esq*., for the Charging Party Union.

## DECISION

### STATEMENT OF THE CASE

FRANK H. ITKIN, Administrative Law Judge. Unfair labor practice charges were filed in the above cases on June 30, September 6 and 18, 1989, and a consolidated complaint issued on August 9, 1990. The complaint was later amended at the hearings. The complaint alleges that Charging Party Union has been and is the exclusive bargaining agent of separate appropriate units of both Respondent Employers; that such recognition has been embodied in separate successive collective-bargaining agreements between the Union and Employers; that on March 29, 1989, the Employers commenced joint negotiations with the Union in an attempt to negotiate new agreements; that during the ensuing negotiations from March to September 1989, the Employers made take-it-or-leave-it bargaining proposals, refused to modify such proposals, and made regressive bargaining proposals while engaging contemporaneously in the above conduct notwithstanding that no intervening change in circumstances had occurred to justify such regressive proposals; and that the Employers by their overall conduct including that described above failed and refused to bargain in good faith with the Union, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act.

The complaint further alleges that about April 13, 1989, the Employers demanded that the Union agree to a provision that the unit position of spotter/loader be eliminated from the bargaining units as a condition of consummating any collective-bargaining agreement; that this provision is not a mandatory subject of collective bargaining; that since about April 21, 1989, the Employers insisted to impasse on this subject; that about May 8 and June 12, 1989, the Employers implemented their take-it-or-leave-it proposals; that about September 11, 1989, the Employers implemented their regressive sets of bargaining proposals; that about September 11, 1989, Respondent Paramount implemented the proposal pertaining to the elimination of the position of spotter/loader from its unit; and that the Employers by their overall conduct including that described above failed and refused to bargain in good faith with the Union, in violation of Section 8(a)(5) and (1) of the Act. In addition, the complaint alleges that a strike by certain unit employees of Respondent Paramount commencing about November 14, 1989, was caused and prolonged by the Employers' unfair labor practices as alleged above.

Counsel for Respondent Employers in the answer to the consolidated complaint denies violating the Act as alleged, and states that the Employers' ''bargaining strategies and implementations were made necessary by the refusal of the Union to bargain in good faith, for example, by the Union's refusal to meet for negotiations.''

Hearings were held on the issues thus raised in St. Louis, Missouri, on October 30 and 31, 1990. On the entire record, including my observation of the demeanor of the witnesses, I make the following

## I. FINDINGS OF FACT

Respondents Paramount and Allstate are wholesale liquor distributors in Missouri, and are admittedly employers engaged in commerce as alleged. Charging Party Union Local 610 is admittedly a labor organization as alleged. Since about 1970, Local 610 has been admittedly the exclusive bargaining agent of separate appropriate units of Paramount's and Allstate's ''truck drivers and spotter/loaders'' employed at their respective St. Louis facilities. Such recognition has been embodied in separate successive collective-bargaining agreements, the most recent of which were effective by their terms from April 1, 1985, through March 31, 1988, and extended by written agreements of the parties through March 31, 1989. About March 29, 1989, Paramount and Allstate commenced joint negotiations with Local 610 for new collective-bargaining agreements. The evidence pertaining to the conduct of the parties during and following the negotiations is summarized below.

### A. *The March 29 Bargaining Session*

William Van Hoose, business representative for Local 610 and chief union spokesman during the negotiations, testified that negotiations for new collective-bargaining agreements commenced on March 29, 1989; that he then presented the Employers with separate written proposed ''modifications'' to the existing collective-bargaining agreements (G.C. Exhs. 4, 9, and 10); that ''the parties then proceeded to review these proposed modifications'' which included a proposed ''substantial wage increase''; and that he ''then . . . asked the Company for their proposals.'' The Employers' chief spokesman E. J. Holland in turn presented to Van Hoose a copy of General Counsel's Exhibit 11 as the Employers' ''proposal.'' (G.C. Exh. 11 is a copy of the Employers' 1986–1989 collective-bargaining agreement with Teamsters Local 688 covering the Employers' St. Louis warehouse workers.) The Employers were seeking ''parity'' in the terms and conditions of employment for both their driver and warehouse employees.

Van Hoose, as he recalled,

> told Mr. Holland that I was there to negotiate a contract for Teamsters Local 610, that I had no interest in Teamsters Local 688's contract. . . . Discussion of parity had come up and I told Mr. Holland that our employees, the drivers, worked out in all kinds of weather and very dangerous conditions, we have drivers robbed every so often or assaulted, where the warehouse people work in a controlled environment. That was my basis for feeling that we needed or [were] entitled to the extra amount of money.

The Local 688 warehouse employees of Respondents at their St. Louis facilities received approximately $3 less an hour in wages and benefits than the Local 610 drivers. The Employers' representative wanted ''parity between the drivers and the warehousemen . . . a reduction of about three dollars an hour in pay.''

Holland explained to Van Hoose ''that through all the contracts they had with other labor organizations throughout the State . . . they only had one contract [and] one union representing the other places''; that is, ''one union that represented both driver and warehouse employees.'' Van Hoose replied that ''we were in St. Louis . . . we have always had one Local representing the warehouse and one Local representing the drivers.'' The meeting ended ''rather abruptly'' without any agreement between the parties.[1]

E. J. Holland, attorney and chief negotiator for the Employers, recalled that at this meeting Local 610 wanted, inter alia, a 50-cent hourly wage increase for each of the 3 years of its proposed contract; ''to add a driver classification'' pertaining to work previously done by nonunit personnel; and certain ''work to be assigned to Local 610 instead of a variety of subcontractors who traditionally had been used for it.'' The Employers discussed the ''state of the wholesale liquor industry'' and how it was ''causing [their] business to be substantially less profitable''; and wanted to correct the ''inequity'' in St. Louis with ''parity'' between the Local 610 drivers and Local 688 warehousemen. Holland handed over a copy of the Local 688 contract and Van Hoose ''angrily threw it back.''

### B. *The March 30 Bargaining Session*

The second bargaining session was held on the following day, March 30. As Van Hoose testified, Holland proposed

> to put our group in a [health maintenance organization] program called LHI [Labor Health Institute]; it is funded by Teamsters Local 688 and the Employers; and it is for Local 688 members only.

The Local 610 unit drivers were in the Union's Central States Health and Welfare plan, and Van Hoose explained to Holland that he ''didn't think we could be a part of this'' program covering the warehouse employees.

The subject of ''parity'' was again discussed. Van Hoose again explained the ''differences'' in the working conditions of the Local 610 drivers and Local 688 warehousemen. Holland replied that

> throughout the industry in the State . . . the warehousemen and drivers were the same, they were looking for the same thing here.
>
> . . . .
>
> St. Louis was the only location [where] these Employers did not have parity between warehousemen and drivers.

Van Hoose ''suggested to Mr. Holland to bring the Local 688 people up to the Local 610 level, and they would have parity.'' Holland ''rejected [this] offer'' and the meeting ended without any agreement between the parties.[2]

Holland recalled that at this meeting Van Hoose announced that Local 610 ''couldn't accept our . . . parity proposal'' and ''we can't get in'' Local 688's LHI health plan. The Employers made further statements and presentations pertaining to the ''state of the industry.''

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[1] See also the testimony of Nicholus Sanders, a Paramount driver employee and Local 610 trustee, shop steward, unit chairman, and participant in the 1989 bargaining meetings. Tr. at 224–230.

[2] See also the testimony of employee and Union Representative Sanders. Tr. at 230–232.

C. *The April 11 Bargaining Session*

The parties next met on April 11. As Van Hoose recalled, Holland presented ''an entire contract proposal'' for the Employers (G.C. Exh. 12). Van Hoose ''described it as the Local 688 contract with just the cover pages changed.'' The parties discussed the Employers' contract proposal. The term of the proposed agreement was for 9 months. Van Hoose noted that ''that would have brought our [Local 610] contract to expire at the same time Local 688's contract would expire,'' January 14, 1990. Van Hoose further noted that the Employers also ''wanted to buy our sick leave back from us.'' The prior Local 610 contract, unlike the Local 688 contract, ''provided for employees to have paid sick leave.'' And, the Employers were ''proposing that accrued sick leave benefits would be bought out by the Employers for a cash settlement or something'' and sick leave would not continue in subsequent Local 610 contracts. The Employers had previously secured a similar elimination of this sick leave benefit from Local 688.

In addition, as Van Hoose testified, the Employers' proposed LHI health plan was discussed. Holland initially stated that ''we would go talk to Mr. Gamache, who was the head officer of Local 688,'' about this health plan. Van Hoose responded that ''he [Holland] could go talk to him, but I wasn't going to.'' Discussion followed. Ultimately, ''Holland agreed basically that we would retain the Central States Health And Welfare Plan.'' Van Hoose noted that in fact the Central States Health and Welfare Plan was ''cheaper'' than the Local 688 LHI health plan. Further, Van Hoose

> told them [the Employers] that we had given them written proposals and that we also had a contract and that we would like to discuss our proposals and our contract, not Local 688's.[3]

The Employers ''agreed'' to discuss the Local 610 ''proposals.'' Holland, however, identified his ''key areas of concern'' as including ''parity between Teamsters Local 610 and Local 688.'' No agreements were reached at this meeting.[4]

Holland recalled that at this meeting the Employers presented a ''new proposal'' or a ''complete document.'' The Employers agreed to obtain ''parity'' without ''having them go into the Local 688 LHI plan.'' The Employers would make ''appropriate adjustments'' elsewhere. Actually, as Holland noted, the existing Local 610 health plan is ''less expensive'' than the LHI plan. Holland emphasized to Local 610 that the Employers were concerned about ''economic parity or equity'' with the Local 688 warehousemen in St. Louis; ''rough equivalence in contract language''; ''hours of work''; and ''unworked time.''

[3] Van Hoose ''pointed out'' the ''difference'' between the expired Local 610 contract and the Employers' ''proposals''; ''15 articles relating to our contract [were] completely left out of their proposals.''

[4] Van Hoose, on cross-examination, acknowledged that at this meeting the Employers made a ''specific presentation'' as to why ''the industry was in sad shape'' with charts and graphs. See R. Exh. 2, information on price changes in prior years. See also the testimony of employee and Union Representative Sanders. Tr. at 233–240.

D. *The April 13 Bargaining Session*

The parties next met on April 13. Van Hoose recalled that the Employers reviewed the Local 610 proposed contract, stating their positions item by item. Following lunch and a caucus, the Union reviewed its proposed contract article by article, ''offering its position.'' Van Hoose, relying on his bargaining notes (see G.C. Exhs. 20 and 4), testified that the Employers wanted to delete from the Local 610 contract article 3 pertaining to maintenance of standards; article 9 pertaining to union activities; article 10 pertaining to jurisdiction; article 11 pertaining to successors; article 31 pertaining to lie detection; article 32 pertaining to separation; article 35 pertaining to garnishment; article 42 pertaining to sick leave; and article 44 pertaining to cost of living adjustments. Van Hoose noted that, except for the lie detection provision, the above items which the Employers wanted deleted from the Local 610 contract do not appear in the Local 688 contract.

In addition, Van Hoose testified that the Employers proposed no change with respect to article 5 pertaining to union security; article 6 pertaining to dues check off; article 7 pertaining to unauthorized activity; article 8 pertaining to stewards; article 12 pertaining to subcontracting; article 13 pertaining to hiring; article 14 pertaining to picket lines; article 15 pertaining to struck goods; article 18 pertaining to probationary employees; article 19 pertaining to casuals; article 22 pertaining to work assignments; article 24 pertaining to discharge and suspension; and article 46 pertaining to invalidation. Van Hoose explained that the Employers would continue the ''present language'' pertaining to subcontracting ''if we would stop writing grievances over it.'' And, Van Hoose observed that these no change items are substantially the same as those contained in Local 688's contract.[5]

The Employers, according to Van Hoose, made no counter proposals to some of Local 610's proposals. And, when the Employers ''offered language as a counter proposal to the Local 610 language in G.C. Exh. 4,'' the ''language came from their April 11 proposal'' or the Local 688 contract. Thus, article 25 pertains to leaves of absence. The Employers wanted the Local 688 contract language for section 1 of article 25; to delete section 2; no change for section 3; and to delete section 4. In addition, with respect to article 1 pertaining to recognition, ''Holland wanted to delete the spotter/loader position out of the recognition'' clause. Hol-

[5] Van Hoose also recalled that the Employers had requested no change in art. 26 pertaining to safety and health; art. 27 pertaining to tools and equipment; art. 28 pertaining to loss or damage; art. 29 pertaining to bonds; art. 30 pertaining to uniforms; art. 36 pertaining to bail and suspension; and art. 47 pertaining to the complete agreement.

In addition, Van Hoose recalled that art. 37 of the Local 610 contract contained miscellaneous provisions. The Employers agreed to ''some'' of these provisions; as to others, the Employers wanted ''modifications.'' The Employers wanted the ''jury duty'' provision limited ''to a petty jury only'' even though there was no corresponding limitation in the Local 688 contract. The Employers made no offer to include in art. 37 of the Local 610 contract ''additional matters'' which in fact are contained in the Local 688 contract miscellaneous provisions (pertaining to, for example, ''blood banks'' and ''breaks''). Van Hoose noted, however, that when the Employers previously had presented Local 610 with the Local 688 contract as the Employers' ''proposal'' at the initial March 29 meeting, these ''additional matters'' were included in the Employers' ''proposal.''

land indicated that ''they wanted to eliminate the job from the jurisdiction [of] Local 610'' and ''would have given it to Local 688.'' ''Later, they agreed that they would retain the job but that the Company would have the right to assign it to whomever they wanted.''[6]

The Union thereafter presented its ''position'' article by article. Local 610, referring to article 1, wanted to ''retain'' the spotter/loader position. Local 610 agreed with the Employers' proposal on article 2 pertaining to management rights. Van Hoose recalled that this was ''one instance'' where ''they counter proposed some language of their own'' and the Union ''agreed.'' The Employers had proposed, with respect to article 16 pertaining to grievances, ''language out of'' Local 688's contract, and the Union had proposed its grievance language with certain time modifications ''to accommodate'' the Employers. As for article 43 pertaining to wages, Local 610 proposed a 75-cent hourly wage increase the first year of a 3-year contract, and 50-cent increases during the next 2 years. The Employers stuck by their ''original proposal'' which would require Local 610 to take a $3-hour wage decrease under the Local 688 ''levels.'' Apart from items such as management rights and the preamble and various no change items referred to above, there were essentially no items of agreement. As Van Hoose put it, ''both sides were going nowhere.''[7]

Holland recalled that at this meeting the Employers ''felt that it was important that [they] demonstrate some flexibility''; the Employers previously had proposed various deletions and changes with respect to the prior Local 610 contract; and on April 13 the Employers agreed to ''no change'' with respect to various of these items. For example, the Employers agreed that ''there would be no change in the recognition clause'' with respect to ''spotter/loaders.'' Holland claimed that despite the Employers' ''flexibility'' there was ''a substantial tightening of'' Local 610's ''position.'' For example, Local 610 wanted the Employers to ''pay for all negotiating time'' and Local 610 ''increased'' its prior wage increase proposal from a 50- to a 75-cent wage increase during the first year of a 3-year contract with 50-cent increases in the next 2 years. According to Holland, ''they were making all these . . . outlandish proposals in the face of an industry that was in serious decline and consolidation.'' Holland testified:

> I told them that it appeared to me that we were at impasse . . . [Local 610] with their latest proposal [was] going in one direction and we were going in exactly the opposite direction . . . there seemed to be no place to go. Van Hoose said, well I don't see any daylight either.[8]

### E. *The April 21 Bargaining Session*

The next bargaining session was on April 21. Van Hoose testified that Local 610 proposed at this meeting a ''four day ten hour day work week.'' This proposal would reduce overtime and assertedly save money to cover the increased cost in the health and welfare program. Holland ''basically rejected it'' and ''discussed implementing the terms of their proposal.'' Holland ''said that he felt the parties were at impasse'' and ''spoke about the possibility of implementing.'' This meeting ''also ended rather abruptly.''[9]

Holland testified that a union wage freeze proposal (see fn. 9, supra) was ''unacceptable''; ''the Union apparently thought our objective was not parity but a wage freeze''; and ''I told them that it wasn't the case . . . we were after parity.'' ''Van Hoose was very angry and he stormed out of the meeting.'' As Holland later explained to Van Hoose,

> I told him that we were concerned . . . because the time was getting away from us . . . each day we waited was costing the Employers money that they thought they shouldn't be spending on disparate wages between the warehousemen and drivers.

Van Hoose and Holland thereafter exchanged letters. (See G.C. Exh. 13; R. Exh. 3.) Van Hoose expressed his ''disappointment'' and requested a new date to resume negotiations. Holland responded, referring also to a telephone conversation between the two spokesmen, stating, inter alia, ''my clients are prepared to meet again if there is a possibility that we can reach agreement''; ''we have scheduled a negotiating session for . . . May 4''; ''you indicated . . . that the Union would take no job action until after our meeting of May 4''; ''we have committed not to implement our proposal before then''; ''my clients are absolutely firm on the notion of obtaining parity between the driver group and the warehouse group in St. Louis''; and ''please plan to come to our meeting of May 4 with a clear and prompt indication of your willingness to accept parity as a concept.''

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[6] Van Hoose acknowledged on cross-examination that ''a spotter/loader backs trucks into the dock and loads the trucks with the loader''; Richard Welch a Local 610 member was the spotter/loader at Paramount; there was ''discussion [during the negotiations] that it is the kind of work that could be done by employees outside [Local 610's] bargaining unit''; spotting consists of the driver ''backing into a place to be loaded''; ''loading is simply the act of loading the vehicle''; in the past the Local 688 warehousemen ''would help load'' and the Local 610 driver or spotter/loader ''would help load''; ''before any of this they would both load but only the Local 610 person would do the spotting''; and the Employers' ''proposal was that they wanted others, in addition to the Local 610 folks, to be able to spot.''

[7] Van Hoose, on cross-examination, acknowledged that ''at the conclusion of this meeting'' Holland stated that ''it appears that the Employers need you [Local 610] to go one way and that you're going the other way,'' referring apparently to the Union ''increasing its demands in some respects.'' See also the testimony of employee and Union Representative Sanders. Tr. at 240–245.

[8] See also the testimony of Paramount Vice President Stephen Rudolph (Tr. at 467–474) and Allstate Vice President William Reichhardt (Tr. at 480–484).

[9] Van Hoose, on cross-examination, acknowledged that ''parity'' was the ''large issue'' during the negotiations; that ''perhaps'' he said to the Employers during the negotiations ''that under no circumstances [was he ever] going to agree to a decrease''; that he ''never offered to take'' a decrease in unit members' wages; and that he stated to the Employers that ''if they headed down the road of a decrease they were in line for a big labor dispute'' meaning a ''strike.'' Van Hoose also acknowledged that prior to attending the April 21 session he had proposed to the Employers through the mediator that Local 610 ''would accept a wage freeze,'' and the Employers had rejected this proposal still insisting on ''parity.'' Van Hoose, angered over this rejection, ''stormed out of this meeting.'' See also the testimony of employee and Union Representative Sanders. Tr. at 246–247.

F. *The May 4 Bargaining Session*

Van Hoose testified that at the May 4 meeting Local 610 ''proposed a nine month contract with [an] increase in health and welfare, and we would take a wage freeze for a nine month period, and we would sit down and negotiate with Local 688,'' that is, ''negotiate jointly with Local 688 upon expiration of [the Union's] nine month contract proposal'' which would ''expire at the same time as the Local 688 agreement.'' Holland rejected the proposal and announced that the Employers

> would implement . . . they would have a final offer for [Local 610] that afternoon or [the next] morning . . . they would implement the final offer [on] May 8.

The Employers thereafter presented no proposals or discussed any change of position at this meeting.[10]

Holland recalled that Local 610 Secretary John Metz

> told me [at this meeting] that he was willing to go to a nine month contract, which was really the first that we'd heard of that, and would recommend a freeze. He didn't really commit to me in any fashion that he would agree to parity . . . he would be willing to discuss it or work toward it, but he just needed more time. . . . I told him that it simply would not work; we had to have parity.

The Union wanted a ''final offer'' or ''final proposal.'' Holland agreed to prepare one.

G. *The Employers' Final Offer of May 4*

Holland, by letter dated May 4 (G.C. Exh. 14) sent Van Hoose the Employers' ''final'' ''proposal for a new collective bargaining agreement.'' Van Hoose had requested such a ''proposal.'' Holland explained in his May 4 letter that ''this is a complete proposal and is intended to incorporate any tentative agreements we reached during negotiations as well as the many changes the Employers made in their initial proposals.'' Holland added that ''the economic proposal requires just a brief explanation'' and discussed calculations and their application. Holland concluded:

> During our meeting today you continued to reject the Employers' economic proposal as unacceptable to the Union, . . . [and] absent an acceptance prior to midnight Sunday May 7, 1989, we will conclude that the parties are at impasse. In that event the Employers intend to implement the terms of their economic proposal effective Monday May 8 . . . . Since no definitive information has been received yet from Central States [health plan] we simply will continue the current contribution level to Central States and the wage rate to be implemented on Monday will be $10.93 per hour.

Van Hoose recalled that only ''the economic part'' of this ''final offer'' pertaining to ''wages'' was implemented on May 8.

Holland testified that his May 4 proposal contained no change whatsoever in the Local 610 contractual recognition clause. The Employers previously had ''altered their position'' on the ''spotter/loaders'' on April 13.

H. *The Employers' May 27 Letter Announcing the Implementation of the Remaining Terms of Their May 4 Proposal and the July 5 Attempt to Present New Proposals*

Holland, by letter dated May 27 (G.C. Exh. 15) apprised Van Hoose:

> On May 4 . . . I sent . . . you a specific proposal. . . . To date we have had no response. Pursuant to that letter the Employers on May 8 placed in effect the wage rate which had been proposed. Since we have not heard from you we now feel it necessary to implement the remaining terms and conditions of the May 4 proposal. Therefore effective Monday June 12, 1989 the Employers intend to place in effect all the remaining terms and conditions of their May 4 proposal.

Holland also noted that since the prior collective-bargaining agreements have expired, the Employers are ''no longer free to enforce a Union security agreement or agree to check off''; ''the Union and its members currently have the right to strike''; and ''there is no continuing reciprocal commitment on the part of the Employers to arbitrate.''

Van Hoose recalled that the noneconomic terms were in fact implemented by the Employers on June 12 and, as noted, Local 610 filed unfair labor practice charges with the Board on June 30, 1989. Thereafter, Holland, by an undated certified letter postmarked July 5 (G.C. Exh. 16) informed Van Hoose:

> Recent developments have caused the Employers to reexamine their proposal of May 4, 1989. We are prepared to present new proposals for a collective bargaining agreement and suggest that a meeting be scheduled at the parties' earliest convenience.

Subsequently, during late August, Holland telephoned Van Hoose ''about reestablishing negotiations.'' Van Hoose then told Holland that he had ''discussed the situation'' with Local 610 Secretary John Metz, and Metz had ''advised [Van Hoose] to present'' this request to the Union's executive board at its next scheduled meeting in late September.

Holland, by letter dated August 29 (G.C. Exh. 17) complained to Van Hoose and Metz over ''the Union's unwillingness to resume negotiations,'' and then apprised Van Hoose and Metz:

> On Friday August 25, 1989, I was finally able to speak directly with Bill [Van Hoose]. He advised me that he was not ''authorized'' to engage in negotiations and that the matter was in the hands of the Union's executive board. Frankly, we believe the Union's continued refusal to negotiate is a violation [of the Act]. However, instead of pursuing our rights under the Act, we once again request immediate negotiations in an effort to achieve a new collective bargaining agreement. To that end I enclose a revised proposal for your consideration. The revised proposal is an update of the Employers' May 4 proposal. . . . Our target date for making a decision with respect to the proposal is September

[10] See also the testimony of employee and Union Representative Sanders. Tr. at 247–250.

> 11. . . . [I]f the Union persists in refusing to meet with the Employers we intend to implement the terms of these most recent proposals on Monday September 11.

Van Hoose denied telling Holland that he was ''not authorized to engage in negotiations.'' Van Hoose also denied telling Holland that he was ''not willing to meet for negotiations'' or telling ''the federal mediator that [he was] unwilling to meet and resume negotiations.'' Van Hoose claimed that at no time after the Employers' May 4 proposal ''did the Employers say . . . anything indicating . . . that the Employers were prepared to offer further concessions or change [their] bargaining proposals in a manner which might break this impasse.''

Van Hoose, on cross-examination, acknowledged that the federal mediator who had participated in the above meetings had telephoned him and requested resumed negotiations, and that he then explained to the mediator that he ''was waiting on a decision from the executive board'' and ''I wouldn't meet until I got authorization to meet from the executive board.'' Van Hoose added:

> As of yet I had not had a chance to sit down with all of them and explain it.

And, finally, Van Hoose acknowledged that even when the Union's executive board met in late September ''they didn't make any decision about meeting with the Employers'' and therefore he ''had no clarification'' or ''authorization'' from them.

Holland testified that following the May 4 meeting the Employers

> were in a constant state of preparation for a strike which everyone believed would happen any day . . . [but] I never heard a word from the Union.

Holland further recalled:

> What happened was that nothing happened, and the Employers were beginning to feel that they should reassess their position that this Union which we always figured would strike, that we thought had this huge power in St. Louis, apparently couldn't get its members out. So, there being no strike, and the Employers having operated under some of the changed terms and conditions, they began talking about you know maybe we really should get ourselves in a position to assert control over our business for the first time.

As a consequence, Holland prepared General Counsel's Exhibit 16 on or about July 1, which he sent to Van Hoose requesting a meeting between the parties to discuss ''new proposals.'' Not having received any response to this request, Holland telephoned Van Hoose. Holland recalled that Van Hoose had told him that ''he was not authorized or was not able or was not permitted to meet, that the matter was in the hands of the executive board and that the executive board was not meeting until late September.'' Holland later prepared and sent on to Van Hoose the Employers' August 29 letter with proposals. (See G.C. Exh. 17.)

I. *The Employers' August 29 Proposals*

Van Hoose reviewed the Employers' August 29 proposal (G.C. Exh. 17) and identified the various ''provisions [or proposals] which were not the subject of prior negotiations'' between the parties, as follows: The Employers' proposed deletion of article 8 pertaining to subcontracting; the Employers' proposed deletion of article 9 pertaining to hiring; the Employers' proposed deletion of section 3 of article 12 pertaining to the two-man adjustment board under the grievance and arbitration procedures; the Employers' proposed new language for sections 1 and 5 pertaining to seniority; the Employers' proposed deletion of articles 14 and 15 pertaining to probationary employees and casuals; the Employers' proposed ''new'' section entitled ''temporary employees''; the Employers' proposed sections 1, 2, 3, and 4 of article 16 pertaining to hours and overtime and the deletion of section 9; the Employers' proposed ''assignment language'' in article 18 pertaining to work assignments; the Employers' proposed ''new'' language pertaining to discharge and suspension in article 19; the Employers' proposed new language in section 6 of article 21 pertaining to safety and health; the Employers' proposed deletion of ''reference to casuals'' in article 22 pertaining to tools and equipment; the Employers' proposed change in article 26 pertaining to workers' compensation; the Employers' proposed change in article 27 pertaining to payroll data; the Employers' proposed new section 6 of article 32 pertaining to vacations; the Employers' proposed change in article 33 pertaining to holidays; the Employers' proposed deletion of section 3 and change in section 4 in article 34 pertaining to wages; and the Employers' proposed addition to article 37 pertaining to the complete agreement. The Employers, as discussed below, implemented their August 29 proposals on September 11, 1989.[11]

Holland acknowledged that ''not all of'' the Employers' August 29 proposals ''were on the bargaining table at any time during the earlier bargaining between the parties.'' For example, the proposal pertaining to ''the temporary employees, the combination of the probationary and casuals, had not previously been discussed.'' This and other August 29 proposals assertedly had been discussed in prior years between the parties. Holland explained:

> [T]hese were for the most part overwhelming things that we had earlier discussed but were unable to obtain . . . we never felt before that we had the strength to get. It now appeared to us based on the Union's actions or inaction that we probably did have the strength to get them . . . . This was a substantial change in whatever had occurred in the past. Second, . . . I thought if I made a more substantial and difficult proposal that would get their attention and get them back to the

[11] See also the testimony of employee and Union Representative Sanders. Tr. at 250–259.

Van Hoose acknowledged that from May 4 until the strike, the Union did not agree to resume negotiations. He explained that this matter ''was tied up with the executive board of the Local.'' In addition, as Van Hoose further stated, ''we felt that the Employers had taken a position at this bargaining of bad faith.'' Van Hoose, on redirect examination, testified that he did not ''have any interest in discussing with Holland the proposals that [Holland] outlined in his August 29 letter'' ''because they were just decreasing from where we were already at.''

> table. . . . I thought that if they had those kinds of proposals they would come back and talk to us in order to avoid that being implemented.

Holland had considered filing unfair labor practice charges against the Union but he and the Employers determined that ''this ultimately had to be resolved at the bargaining table'' and additional charges ''would simply drag it out.'' Not having heard from the Union by September 11, as Holland explained, ''we decided that we really didn't have much choice but to go ahead and implement.''[12]

### J. *The Employees Strike Paramount on November 14*

Van Hoose testified that the Union commenced a strike against Paramount on November 14. Van Hoose met with the employees and the strike commenced shortly thereafter. The Union and its members previously had decided, despite the Employers' implementations commencing on May 8, to wait until November 14 to strike because ''that was their busy season.''

### K. *The Evidence Pertaining to the Elimination of the Spotter/Loader Position*

As noted supra, Van Hoose testified that ''Holland wanted to delete the spotter/loader position out of the recognition'' clause. (See G.C. Exh. 4, art. 1.) Holland indicated that ''they wanted to eliminate the job from the jurisdiction [of] Local 610'' and ''would have given it to Local 688.'' Nevertheless, as Van Hoose acknowledged, ''Later, they agreed that they would retain the job but that the Company would have the right to assign it to whomever they wanted,'' and the Employers' May 4 final proposal made no change in the recognition clause. (See G.C. Exh. 14, art. 1.) The May 4 proposal was implemented by the Employers on May 8 and June 12. (See G.C. Exh. 15.) The Employers' later August 29 ''revised proposal'' stated: ''Art. 1. Recognition.—Discontinue spotter/loader position.'' This ''revised proposal'' was implemented on September 11. (See G.C. Exh. 17.)

Richard Welch, the unit spotter/loader for Paramount prior to his retirement on September 29, 1989, testified that in the past he would be instructed by his supervisor as to ''what trucks [the supervisor] would want spotted and . . . would spot those trucks on the loading docks,'' that is, ''back them up to the docks''; and then he ''went to the warehouse and proceeded to set up the conveyors to load.'' Welch was covered under the Local 610 collective-bargaining agreement. However, on September 7, 1989, Welch received a copy of General Counsel's Exhibit 24 with his paycheck, which included the Employers' August 29 ''revised proposal.'' Welch observed that his ''job was being eliminated'' on the following Monday September 11. Welch then had a series of conversations with various Employer representatives as described below.

Welch spoke with Operations Manager Roger Anderson. Anderson granted Welch permission to take his vacation the following week. Welch then spoke with Management Representative Stephen Rudolph about the loss of his job. Rudolph told Welch that ''it was his understanding that . . . [Welch] could continue on the job until [he] retired or left the Company,'' and then the spotter/loader position ''would go to Local 688.'' Later, however, Anderson apprised Welch that

> when I [Welch] returned to work the following week that I would be returning to the street [working as a driver] and not continuing the spotter/loader [job] as Mr. Rudolph had told me.

And, subsequently, Rudolph also stated to Welch

> that he [Rudolph] wanted to apologize, that there had been a meeting between Roger Anderson and Dale Griffin, the vice president of the Company, and they had decided to go ahead and implement this discontinuing of the spotter/loader job.

As Welch further testified, Company Vice President Griffin thereafter apprised Welch that ''this position was being eliminated,'' and ''they just did not want Local 610 to have this work any longer.'' Griffin told Welch that ''if [he] could go back into Local 688 that [Griffin] would assign [him] the job as spotter/loader.'' Welch explained that he ''couldn't do that.'' Welch, victim of robbery attempts while driving for the Employers, explained that he ''didn't want to go back on the street'' as a driver. Griffin subsequently notified Welch

> that he [Griffin] had finally talked to his lawyer and they didn't see any problem with [Welch] working the last two weeks [of the month prior to retirement], only as a loader, but not to move any trucks.

Welch took his retirement at the end of this 2-week period. He had no intention of retiring until he received the Employers' September 7 notification.[13]

Paramount Vice President Stephen Rudolph testified that ''after the spotter/loader work assignment was changed in September 1989,'' the ''spotting'' was performed by ''a non-Union supervisory employee.'' Previously, unit employee Welch had performed these ''duties.'' Rudolph generally recalled that he had discussed this subject with Welch, as follows:

> I [Rudolph] had a misunderstanding of the implementation of the proposal at the time. I expressed to him [Welch] that he could continue in a loading capacity. I misspoke myself when I said that. . . . [Later] I explained to Welch that he was a member of Local 610 that did our delivery work and that he was high on the seniority list and he could drive a truck . . . [as] did the other 20 people in the bargaining unit.

Allstate Vice President William Reichhardt testified that Allstate employed four Local 610 unit employees during the pertinent period consisting of three drivers and one spotter/loader; Bob Reaves and Ed Clinkscale ''would switch off'' in performing the duties of spotter/loader; nonunit Local 688 warehousemen would ''assist in the loading'';

[12] Holland acknowledged on cross-examination that ''some'' of the Employers' August 29 proposals (G.C. Exh. 17) ''are less favorable to'' Local 610 than those ''ultimately negotiated with the Local 688 warehouse employees in the latter part of 1989.''

[13] On cross-examination, Welch acknowledged that ''as far as I know'' no Local 688 person thereafter did the ''spotting''; ''the spotting was thereafter done by the supervisor.''

> and then there were times when neither Reeves [sic] or Clinkscale was at work and we had to find another individual to do it. Usually it was the supervisor but from time to time it may have been a Local 688 employee.

On September 11, 1989, Allstate ''initially had a supervisor doing that work and then we went to Local 688.''[14]

## II. DISCUSSION

Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer ''to refuse to bargain collectively with the representative of his employees.'' Section 8(d) provides that ''to bargain collectively is the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.'' In *NLRB v. Insurance Agents' Union*, 361 U.S. 477, 485, 486 (1960), the Supreme Court recognized that ''[c]ollective bargaining . . . is not simply an occasion for purely formal meetings between management and labor while each maintains an attitude of take it or leave it; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract''; though ''the parties need not contract on any specific terms . . . they are bound to deal with each other with a serious attempt to resolve differences and reach a common ground.'' Similarly, in *NLRB v. Katz*, 369 U.S. 736, 747 (1962), the Supreme Court held that the parties must refrain not only from behavior ''which reflects a cast of mind against reaching agreement,'' but from behavior ''which is in effect a refusal to negotiate or which directly obstructs or inhibits the actual process of discussion.'' In short, as stated by the court of appeals in *NLRB v. General Electric*, 418 F.2d 736, 762 (2d Cir. 1969), cert. denied 397 U.S. 965 (1970),

> [T]he statute clearly contemplates that to the end of encouraging productive bargaining, the parties must make ''a serious attempt to resolve differences and reach a common ground'' . . . an effort inconsistent with ''a predetermined resolve not to budge from an initial position.'' A pattern of conduct by which one party makes it virtually impossible for him to respond to the other—knowing that he is doing so deliberately—should be condemned by the same rationale that prohibits ''going through the motions'' ''with a predetermined resolve not to budge from an initial position'' . . . [citations omitted].

An employer violates this statutory duty to bargain in good faith when it makes ''unilateral changes in conditions of employment under negotiation''; for, as the court of appeals explained in *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968), an employer is only privileged to unilaterally implement such changes that ''are reasonably comprehended within his pre-impasse proposals'' ''after bargaining to an impasse, that is, after good-faith negotiations have exhausted the prospects of concluding an agreement''; there must be ''no realistic possibility that continuation of discussion at that time would be fruitful.'' And, as the Board more recently explained in *Sierra Publishing Co*., 291 NLRB 552 (1988), ''Only in this latter context where there has been a complete breakdown in the entire negotiations is the employer free to implement his last, best and final offer.''[15]

The Board, applying the above principles in *Pipe Line Development Co*., 272 NLRB 48 (1984), explained:

> We note that, although Section 8(d) of the Act requires an employer to meet at reasonable times and confer in good faith with respect wages, hours and conditions of employment, such obligation does not compel either party to agree to a proposal or to make a concession. In determining whether a party has negotiated in good faith, it is necessary to scrutinize the totality of its conduct. If an employer's conduct demonstrates that it sought to avoid an agreement, then the employer has violated the Act. If on the other hand the employer has used its economic power to seek a lawful contract which it considers desirable, there is no violation. . . . In *O'Mally Lumber Co*., 234 NLRB 1171, 1179–1180 (1978), the Board stated: ''While a company's change of negotiating posture may be evidence of bad faith, the total circumstances must be considered. Where an employer's economic power increases through the successful weathering of a strike, it is not unlawful for the employer to use its new found strength to secure contract terms that it deems beneficial.''

See also *Barry-Wehmiller Co*., 271 NLRB 471 (1984); and *Challenge-Cook Bros*., 288 NLRB 387 (1988).

Later, in *L. W. Le Fort Co*., 290 NLRB 344 (1988), the Board majority found:

> After seven bargaining sessions, respondent [employer] submitted its final proposal dated May 30. The employees rejected the proposal on June 1 but did not vote to strike. . . . The parties met again on June 3 and 7 but did not resolve their differences. On June 11, respondent made another final offer that contained some provisions more restrictive than those it had proposed earlier. . . . From the evidence presented concerning negotiations, we conclude that the parties engaged in hard

[14] The testimony detailed above is essentially undisputed. There are, however, some conflicts. Insofar as the testimony of Van Hoose and Sanders conflicts with the testimony of Holland, Rudolph, and Reichhardt with respect to the bargaining sequence of events, I am persuaded on this entire record that the recollections of the latter witnesses are more complete, accurate, and reliable. The testimony of the latter witnesses in this respect is in part mutually corroborative, substantiated by undisputed documentary evidence, and substantiated by admissions of Van Hoose. In addition, I also find on this record that the above-recited testimony of Welch pertaining to his ultimate loss of employment as a spotter/loader is complete, accurate, and trustworthy. His testimony is essentially undisputed, supported by the testimony of Management's witnesses, and he impressed me as a credible and trustworthy witness. Insofar as the testimony of Welch conflicts with the testimony of Rudolph and Reichhardt, I credit the former as more complete and trustworthy.

[15] However, as the Board also made clear in *Howard Electrical & Mechanical*, 293 NLRB 472 (1989),

> [W]hen a party unilaterally changes the scope of the [bargaining] unit, it is irrelevant whether impasse has been reached. The only question is whether the other party has consented to the change. . . . [T]he crucial question in the case is whether the unions consented to the proposed changes in the scope of the unit, changes over which, because of their nonmandatory nature, the unions were not even required to bargain.

> bargaining, remained far apart on key issues, and reached impasse as of June 1. . . . It is significant, however, that respondent advanced its June 11 proposals after the parties had reached a legitimate impasse and its economic position was strengthened by the employees' failure to strike. In these circumstances, we do not think the June 11 proposals demonstrate that that respondent had no intent to compose the differences it had with the union and to frustrate bargaining.[16]

In the instant case, I find, and conclude, that the parties from March 29 to May 4, 1989, engaged in permissible hard bargaining, remained far apart on key issues, and reached impasse by May 4. Consequently, the Regional Director, on August 14, 1989, understandably dismissed the unfair labor practice charges then pending before him, concluding (G.C. Exh. 21):

> In these circumstances, the investigation failed to establish that the Employer failed and refused to bargain in good faith in violation of Section 8(a)(1) and (5) of the Act, as alleged, rather than, as contended by the Employer, that the parties had reached impasse over the economic terms of a new labor agreement, and that impasse permitted the Employer's conduct in implementing the terms of its final [May 4] proposal.[17]

Thus, as the essentially undisputed and credited evidence of record shows, the parties first met on March 29. Local 610 presented its proposed contract modifications. Local 610 was seeking, inter alia, a ''substantial wage increase.'' The Employers were seeking ''parity'' in wages and working conditions between their St. Louis Local 610 drivers and Local 688 warehousemen. Such ''parity'' existed throughout the State at the Employers' other facilities and apparently in the industry as well. The St. Louis warehousemen were making about $3 less an hour in wages. The Employers presented to Local 610 a copy of the Local 688 contract demonstrating their requested ''parity,'' and the union negotiator Van Hoose ''angrily threw it back.'' The meeting ended ''rather abruptly'' without any agreement between the parties.

The parties met again on the next day March 30. The subject of ''parity'' was again discussed. The Employers explained that

> throughout the industry in the State . . . the warehousemen and drivers were the same, they were looking for the same thing here.
>
> . . . .
>
> St. Louis was the only location [where] these Employers did not have parity between warehousemen and drivers.

Local 610 made it clear that it ''couldn't accept [the] . . . parity proposal.'' The Employers also proposed to place the unit drivers in the health maintenance plan (LHI) covering the Local 688 warehousemen. Local 610 made it clear that ''we can't get in'' Local 688's LHI health plan. This meeting also ended without agreement.

The parties next met on April 11. The Employers presented ''an entire contract proposal.'' Local 610 ''described it as the Local 688 contract with just the cover pages changed.'' The parties discussed the Employers' ''contract proposal.'' The Employers also made a ''specific presentation'' as to why ''the industry was in sad shape'' with charts and graphs. The Employers ''agreed'' to discuss the Local 610 ''proposals.'' The Employers' negotiator Holland, however, identified his ''key areas of concern'' as including ''parity between Local 610 and Local 688.'' In addition, Holland recalled that at this meeting the Employers agreed to obtain ''parity'' without ''having them go into the Local 688 LHI plan.'' The Employers would make ''appropriate adjustments'' elsewhere.

The next meeting was on April 13. The Employers reviewed the Local 610 proposed contract, stating their positions item by item. Following lunch and a caucus, the Union reviewed its proposed contract article by article, ''offering its position.'' According to Van Hoose, ''Holland wanted to delete the spotter/loader position out of the recognition'' clause; ''they wanted to eliminate the job from the jurisdiction [of] Local 610'' and ''would have given it to Local 688''; ''later they agreed that they would retain the job but that the Company would have the right to assign it to whomever they wanted.'' And, as Van Hoose further recalled, the Employers stuck by their ''original proposal'' which would require Local 610 to take a $3-an-hour wage decrease under the Local 688 ''levels.'' Apart from items such as management rights and the preamble and various ''no change items'' detailed supra, there were essentially no items of agreement. As Van Hoose put it, ''both sides were going nowhere.''

Holland recalled that at this April 13 meeting the Employers ''felt that it was important that [they] demonstrate some flexibility''; the Employers previously had proposed various deletions and changes with respect to the prior Local 610 contract; and on April 13 the Employers agreed to ''no change'' with respect to various of these items. For example, the Employers agreed that ''there would be no change in the recognition clause'' with respect to ''spotter/loaders.'' Holland claimed that despite the Employers' ''flexibility'' there was ''a substantial tightening of'' Local 610's ''position.'' For example, Local 610 wanted the Employers to ''pay for all negotiating time,'' and Local 610 ''increased'' its prior wage increase proposal from a 50- to a 75-cent-hourly wage increase during the first year of a 3-year contract with 50-cent increases in the next 2 years. Holland testified:

> I told them that it appeared to me that we were at impasse . . . [Local 610] with their latest proposal [was] going in one direction and we were going in exactly the opposite direction . . . there seemed to be no place to

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[16] As noted in the above decision, Chairman Stephens ''would not extend the logic of *Barry-Wehmiller Co.*, [supra,] . . . finding no manifestation of bad faith in an employer's offering the union a less favorable contract after it had weathered a strike, to the situation here, where respondent has altered its offer for the worse after the union has simply voted to reject it and has for the moment at least declined to strike. . . . Chairman Stephens would find that an employer that without any real explanation makes its total contract offer even less favorable than the offer already rejected is not seeking in good faith to reach a collective bargaining agreement with the union.''

[17] The Regional Director, on October 11, 1989, following the filing of additional charges, revoked his earlier action. See G.C. Exh. 22.

> go. Van Hoose said, well I don't see any daylight either.

The parties met again on April 21. Local 610 proposed a ''four day ten hour day work week.'' Holland ''basically rejected it,'' ''said that he felt the parties were at impasse'' and ''spoke about the possibility of implementing.'' Holland explained to Van Hoose,

> I told him that we were concerned . . . because the time was getting away from us . . . each day we waited was costing the Employers money that they thought they shouldn't be spending on disparate wages between the warehousemen and drivers.

Van Hoose acknowledged that ''parity'' was the ''large issue'' during the negotiations; that ''perhaps'' he said to the Employers ''that under no circumstances [was he ever] going to agree to a decrease''; that he ''never offered to take'' a decrease in unit members' wages; and that he stated to the Employers that ''if they headed down the road of a decrease they were in line for a big labor dispute'' meaning a ''strike.'' Van Hoose also acknowledged that prior to attending the April 21 session he had proposed to the Employers through the mediator that Local 610 ''would accept a wage freeze,'' and the Employers had rejected this proposal still insisting on ''parity.'' Van Hoose, admittedly angered over this rejection, ''stormed out of this meeting,'' and consequently this meeting ''also ended rather abruptly.''

The parties last met on May 4. Holland recalled that Local 610 secretary John Metz

> told me [at this meeting] that he was willing to go to a nine month contract, which was really the first that we'd heard of that, and would recommend a freeze. . . . He didn't really commit to me in any fashion that he would agree to parity . . . he would be willing to discuss it or work toward it, but he just needed more time. . . . I told him that it simply would not work; . . . we had to have parity.

The Union then requested a ''final offer'' or ''final proposal.'' Holland agreed to prepare one.

Holland, by letter dated May 4 (G.C. Exh. 14), sent Van Hoose the Employers' ''final'' ''proposal for a new collective bargaining agreement'' as requested by the Union. Holland explained that ''this is a complete proposal and is intended to incorporate any tentative agreements we reached during negotiations as well as the many changes the Employers made in their initial proposals.''[18] Holland concluded:

> During our meeting today you continued to reject the Employers' economic proposal as unacceptable to the Union, . . . [and] absent an acceptance prior to midnight Sunday May 7, 1989, we will conclude that the parties are at impasse. In that event the Employers intend to implement the terms of their economic proposal effective Monday May 8.

[18] Holland noted that his May 4 proposal contained no change whatsoever in the Local 610 contractual recognition clause. The Employers previously had ''altered their position'' on the ''spotter/loaders.''

Admittedly, only ''the economic part'' of this ''final offer'' pertaining to ''wages'' was implemented on May 8.

Thereafter, Holland, by letter dated May 27 (G.C. Exh. 15), apprised Van Hoose:

> On May 4 . . . I sent . . . you a specific proposal. . . . To date we have had no response. . . . Pursuant to that letter the Employers on May 8 placed in effect the wage rate which had been proposed. Since we have not heard from you we now feel it necessary to implement the remaining terms and conditions of the May 4 proposal. Therefore effective Monday June 12, 1989 the Employers intend to place in effect all the remaining terms and conditions of their May 4 . . . proposal.

I find, and conclude, that Respondent Employers engaged in hard but nevertheless permissible good-faith bargaining during the above sequence of events. The Employers met and conferred in good faith on their proposals and the Union's proposals. The Employers made concessions. The Employers, as they were lawfully entitled, fully explained and maintained their position on ''parity.'' In response, the Union's chief negotiator warned: Local 610 ''couldn't accept [the] . . . parity proposal''; ''angrily threw . . . back'' the Employers' ''parity'' proposal; threatened a strike over this issue; observed that ''both sides were going nowhere''; raised the Union's pending ''substantial'' wage increase proposal; ''stormed out of'' a critical bargaining meeting; and, in effect, agreed with the representative of the Employers that

> we were at impasse . . . [Local 610] with their latest proposal [was] going in one direction and [the Employers] were going in exactly the opposite direction . . . there seemed to be no place to go.

The Union requested a ''final offer'' from the Employers. The Employers promptly prepared such an offer on May 4. The Union never responded. The Employers implemented only the economic terms of this proposal on May 8. Thereafter, the Employers wrote the Union explaining that they would implement the remaining noneconomic terms of the proposal by June 12. Again, the Union did not respond, and the Employers implemented the rest of their proposal.

Respondent Employers, during this sequence, did not improperly make take-it-or-leave-it proposals, impermissibly refuse to modify proposals, make regressive proposals, or insist to impasse on the elimination of ''spotter/loaders'' from the bargaining units. The question remains, however, whether or not Respondent Employers, by their later conduct, in some manner tainted this earlier good-faith bargaining and thus ran afoul of the proscriptions of Section 8(a)(5) and (1) of the Act. For the reasons stated below, I find no such violation.

The Union previously had threatened a strike. Holland explained that following the May 4 meeting, the Employers

> were in a constant state of preparation for a strike which everyone believed would happen any day . . . [but] I never heard a word from the Union. . . .
>
> What happened was that nothing happened, and the Employers were beginning to feel that they should reassess their position that this Union which we always

> figured would strike, that we thought had this huge power in St. Louis, apparently couldn't get its members out. So, there being no strike, and the Employers having operated under some of the changed terms and conditions, they began talking about you know maybe we really should get ourselves in a position to assert control over our business for the first time.

Accordingly, Holland prepared and sent about July 1 (G.C. Exh. 16) a letter to Van Hoose requesting a meeting between the parties to discuss ''new proposals.'' Holland later telephoned Van Hoose requesting such a meeting and enlisted the assistance of the Federal mediator to get the Union to attend such a meeting. Van Hoose and the Union adamantly refused to meet. As Van Hoose acknowledged, the Federal mediator had telephoned him and requested resumed negotiations, and that he then explained to the mediator that he ''was waiting on a decision from the executive board'' and ''I wouldn't meet until I got authorization to meet from the executive board.'' And, Van Hoose acknowledged that even when the Union's executive board met in late September ''they didn't make any decision about meeting with the Employers'' and therefore he ''had no clarification'' or ''authorization'' from them. Finally, Van Hoose acknowledged that from May 4 until the November 14 strike the Union did not agree to resume negotiations, and he did not ''have any interest in discussing with Holland the proposals that [Holland] outlined in his August 29 letter'' ''because they were just decreasing from where we were already at.''

Holland acknowledged that ''not all of'' the Employers' August 29 proposals (G.C. Exh. 17) ''were on the bargaining table at any time during the earlier bargaining between the parties.'' For example, the proposal pertaining to ''the temporary employees, the combination of the probationary and casuals, had not previously been discussed.'' This and other August 29 proposals assertedly had been discussed in prior years between the parties. Holland explained:

> [T]hese were for the most part overwhelming things that we had earlier discussed but were unable to obtain, . . . we never felt before that we had the strength to get. It now appeared to us based on the Union's actions or inaction that we probably did have the strength to get them. . . . This was a substantial change in whatever had occurred in the past. Second, . . . I thought if I made a more substantial and difficult proposal that would get their attention and get them back to the table. . . . I thought that if they had those kinds of proposals they would come back and talk to us in order to avoid that being implemented.

Holland had considered filing unfair labor practice charges against the Union but he and the Employers determined that ''this ultimately had to be resolved at the bargaining table'' and additional charges ''would simply drag it out.'' Not having heard from the Union by September 11, as Holland explained, ''we decided that we really didn't have much choice but to go ahead and implement.''

I find, and conclude, that Respondent Employers, by their September 11 implementation, did not violate Section 8(a)(5) and (1) of the Act. The Union adamantly refused to meet with the Employers. Whether the Union's conduct be viewed as a consent or waiver of such implementation, or whether it be viewed simply as evidence of impasse, the Employers were under the circumstances entitled to implement their August 29 proposals. Moreover, this record amply demonstrates sufficient changed circumstances to justify the Employers' attempt to secure terms and conditions of employment more favorable to the Employers. The parties had bargained in good faith to impasse. The Employers had, after receiving no response from the Union, lawfully implemented their preimpasse proposals. The Union had threatened a strike, but no strike occurred after implementation. The Employers then attempted to meet with the Union to discuss further changes. The Union refused. Under these circumstances, the Employers' further implementation of their August 29 proposals on September 11 was lawful. The Union, at the very least, was obligated to meet with the Employers and thus put the good faith of the Employers to the test of the bargaining table.

I find, and conclude, that Respondent Employers have not, as alleged, made take-it-or-leave-it bargaining proposals; refused to modify such proposals; made regressive bargaining proposals notwithstanding that no intervening change in circumstances had occurred to justify such regressive proposals; since about April 21 insisted to impasse on the elimination of ''spotter/loaders'' from the bargaining units; implemented take-it-or-leave-it proposals about May 8 and June 12; further implemented regressive bargaining proposals about September 11; and by their overall conduct failed and refused to bargain in good faith with the Union, in violation of Section 8(a)(5) and (1) of the Act. I would therefore dismiss these and related allegations of the complaint.

However, I find, and conclude, that Respondent Employers violated Section 8(a)(5) and (1) of the Act by implementing on or about September 11 the August 29 proposal pertaining to the elimination of spotter/loaders from the bargaining units. Thus, the complaint alleges the appropriate bargaining units to be those described in the prior collective-bargaining agreements of the parties. Respondents admit these unit allegations. The pertinent collective-bargaining agreements provide in article 1, Recognition (G.C. Exh. 4), that the Employer

> agrees to recognize and does recognize the Union, its agents, representatives, or successors, as the exclusive bargaining agency for all employees of the Employer traditionally represented by the Union at the Employer's premises, i.e. truck drivers and spotter/loaders.

The Employers' August 29 proposal (G.C. Exh. 17) provides:

> Art. 1. Recognition.—Discontinue spotter/loader position.

This proposal was implemented on September 11.

As noted supra, the Board explained in *Howard Electrical & Mechanical*, 293 NLRB 472 (1989),

> [W]hen a party unilaterally changes the scope of the [bargaining] unit, it is irrelevant whether impasse has been reached. The only question is whether the other party has consented to the change. . . . [T]he crucial question in the case is whether the unions consented to the proposed changes in the scope of the unit, changes over which, because of their nonmandatory nature, the unions were not even required to bargain.

Respondent Employers have therefore changed the scope of the bargaining units by admittedly implementing the above proposal. I reject Respondent Employers' assertion to the effect that this conduct constituted a permissible change in work assignment.[19]

## CONCLUSIONS OF LAW

1. Respondents are employers engaged in commerce as alleged.

2. Charging Party Union is a labor organization as alleged.

3. Respondent Employers have violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union as the exclusive bargaining agent of their employees in the following appropriate units by implementing a proposal to eliminate the position of ''spotter/-loader'' from the units. The appropriate bargaining units include:

> All drivers and spotter/loaders employed at Respondents' St. Louis, Missouri warehouse facilities, excluding office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees.

4. Respondents have not committed other violations as alleged in the amended consolidated complaint and these allegations are dismissed.

5. The unfair labor practices found above affect commerce as alleged.

## REMEDY

To remedy the violation found, Respondent Employers will be directed to cease and desist from engaging in such conduct, or like and related conduct, and to post the attached notice. Affirmatively, Respondent Employers will be directed to, on request, bargain in good faith with the Union as the exclusive bargaining agent of the employees in the above-appropriate units, including ''spotter/loaders,'' and embody any understanding reached in a signed agreement. Further, Respondents will be directed to offer all ''spotter/loaders'' immediate and full reinstatement to their former jobs or in the event their former jobs no longer exist to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of Respondents' unlawful action, by making payment to them of a sum of money equal to that which they normally would have earned from the date of Respondents' unlawful action to the date of its offer of reinstatement, less net earnings during such period, with backpay to be computed as prescribed in *F. W. Woolworth Co*., 90 NLRB 651 (1977), and interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See generally *Isis Plumbing Co*., 138 NLRB 716 (1962). Respondents will be directed to preserve and make available to the Board or its agents, on request, all payroll records and reports and all other records necessary to determine backpay under the terms of this Decision and Order.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[20]

## ORDER

The Respondents, Paramount Liquor Company and Allstate Distributors, Inc., St. Louis, Missouri, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain in good faith with the Union, Miscellaneous Drivers, Helpers, Health Care and Public Employees Local Union No. 610, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive bargaining agent of their employees in the following appropriate units, by implementing a proposal to eliminate the position of ''spotter/loader'' from the units. The appropriate bargaining units include:

> All drivers and spotter/loaders employed at Respondents' St. Louis, Missouri warehouse facilities, excluding office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive bargaining agent of the employees in the above-appropriate units, including ''spotter/loaders,'' and embody any understanding reached in a signed agreement.

(b) Offer all ''spotter/loaders'' immediate and full reinstatement to their former jobs or, in the event their former jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of Respondents' unlawful action, with interest, as provided in this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination or copying all payroll records, social security payment records, timecards, personnel records

[19] The General Counsel also alleges that the November 14 strike was caused and prolonged by Respondents' unfair labor practices. The essentially undisputed and credited evidence of record detailed above does not show a sufficient nexus between the 8(a)(5) and (1) violation found and the ensuing strike. I would therefore also dismiss this allegation.

I note that the complaint, as amended, charges Respondent Paramount with implementing the proposal pertaining to the elimination of ''spotter/loaders.'' See G.C. Exhs. 1(g) and (n). However, it is undisputed that both Respondents implemented this proposal and neither General Counsel nor counsel for Respondents attempted to draw any distinction between Paramount and Allstate in this respect. As counsel for Respondents stated in his brief (p. 19):

> The spotter-loader proposal was revived by the Employers in their August 29, 1989 proposals and subsequently was implemented as part of the September 12 [sic], 1989 implementation after the Union refused to meet and discuss the proposal.

Accordingly, the parties have fully litigated this issue as to both Employers, the pertinent evidence is undisputed and to the extent the complaint only alleges this violation against Paramount, it is amended to allege the violation against both Employers.

[20] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and reports, as well as all other records necessary or useful in analyzing and computing the amount of backpay, as provided in this decision.

(d) Post at their St. Louis, Missouri facilities copies of the attached notice marked ''Appendix.''[21] Copies of the notice on forms provided by the Regional Director for Region 14, after being signed by Respondents' representative shall be posted by Respondents immediately upon receipt in conspicuous places including all places where notices to employees are customarily posted and maintained for 60 consecutive days. Reasonable steps shall be taken to ensure that notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date in this Order what steps Respondents have taken to comply.

IT IS FURTHER ORDERED that the remaining allegations of the amended consolidated complaint be dismissed.

[21] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

## APPENDIX

### NOTICE TO EMPLOYEES
### POSTED BY ORDER OF THE
### NATIONAL LABOR RELATIONS BOARD
### An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain in good faith with the Union, Miscellaneous Drivers, Helpers, Health Care and Public Employees Local Union No. 610, affiliated with International Brotherhood of Teamsters, AFL–CIO as the exclusive bargaining agent of our employees in the following appropriate units, by implementing a proposal to eliminate the position of ''spotter/loader'' from the units. The appropriate bargaining units include:

> All drivers and spotter/loaders employed at our St. Louis, Missouri warehouse facilities, excluding office clerical and professional employees, guards and supervisors as defined in the Act, and all other employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them in Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as the exclusive bargaining agent of our employees in the above-appropriate units, including ''spotter/loaders,'' and embody any understanding reached in a signed agreement.

WE WILL offer all ''spotter/loaders'' immediate and full reinstatement to their former jobs or, in the event their former jobs no longer exist, to substantially equivalent jobs without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings they may have suffered by reason of our unlawful action, with interest, as provided in the Board's decision.

PARAMOUNT LIQUOR COMPANY & ALLSTATE DISTRIBUTORS, INC.